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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL WAYNE KELLER et al., Plaintiffs and Appellants, v. IRVINE COMMUNITY DEVELOPMENT COMPANY LLC et al., Defendants and Respondents.	G039555 (Consol. with G040244) (Super. Ct. No. 06CC04310) O P I N I O N

Appeals from a judgment and a postjudgment order of the Superior Court of Orange County, Clay M. Smith and Robert D. Monarch (retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges. Reversed and remanded.

Gittler & Bradford and Stephen H. Marcus for Plaintiffs and Appellants.

Songstad & Randall and William D. Coffee for Defendant and Respondent Irvine Community Development Company LLC.

Clinton L. Hubbard for Defendant and Respondent Bob McGrann Construction, Inc.

* * *

INTRODUCTION

Homeowners Michael Wayne Keller and Kim Keller (the Kellers) settled their claim against the builder of their home for damages incurred when their property was flooded. The Kellers then sued Irvine Community Development Company LLC (ICDC) and Bob McGrann Construction, Inc. (McGrann), among others, for damages caused by the flooding. The Kellers alleged ICDC had contracted with McGrann to place sandbags around storm drain openings in the Kellers' residential development, and McGrann's negligence in doing so had caused the Kellers' damages. The trial court ruled the release in the Kellers' settlement agreement with the homebuilder also released ICDC and McGrann and entered judgment against the Kellers.

We reverse. The trial court erred by determining the term "predecessors" in the release between the Kellers and the homebuilder constituted a release of ICDC and McGrann's liability. ICDC and McGrann are not covered by the release. As a consequence, the order awarding attorney fees to ICDC and McGrann must also be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The property, located at 22 Golden Eagle in the Shady Canyon development in Irvine, was originally owned by the Irvine Community Development Company, a Delaware corporation, which sold it as a vacant lot to Brookfield Custom Homes, Inc. (Brookfield), in June 2001. Brookfield built a single-family residence on the lot, which it sold to the Kellers in 2004.[1]

[1] The property was actually purchased by Michael W. Keller, as trustee of the Michael W. Keller Living Trust. For ease of reference, we refer to the Kellers as the property owners.

In October 2004, ICDC[2] had responsibility for developing and implementing a storm water pollution prevention plan, which called for placement of sandbags around storm drain openings in the Shady Canyon development. ICDC contracted with McGrann to place sandbags around the storm drain openings on Golden Eagle. On the morning of October 20, 2004, a heavy rainstorm resulted in flooding of the property, damaging the property and the Kellers' personal property.

Brookfield repaired damage to the property and paid the Kellers $60,000. The Kellers and Brookfield entered into a written settlement agreement (the Agreement). The Kellers then initiated the present action against ICDC and McGrann, alleging McGrann's negligence caused damage to the property and to the Kellers' personal property.[3] Immediately before trial began, the court conducted a hearing under Evidence Code section 402 to determine the legal effect of the Kellers' release of Brookfield in the Agreement on ICDC and McGrann. The court determined ICDC and McGrann were released within the scope of the Agreement's release provisions. Judgment was entered, and the Kellers timely appealed.

ICDC and McGrann separately moved for an award of attorney fees from the Kellers. After briefing and a hearing, the trial court awarded $74,370 in attorney fees in favor of McGrann, and $92,598.25 in attorney fees in favor of ICDC. The Kellers timely appealed from the postjudgment order. The two appeals were consolidated for purposes of oral argument. On our own motion, by a separately filed order, we consolidate the two appeals for the purpose of decision.

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[2] ICDC is the successor in interest to the Irvine Community Development Company, a Delaware corporation.

[3] The Kellers also named the Shady Canyon Community Association and The Irvine Company as defendants in their complaint. Before trial, the Kellers dismissed the Shady Canyon Community Association with prejudice, and dismissed The Irvine Company without prejudice.

DISCUSSION

I.

THE AGREEMENT, PROCEEDINGS IN THE TRIAL COURT, AND JUDGMENT

A. *The Language of the Agreement*

The Agreement states that its parties are the Kellers and "BROOKFIELD CUSTOM HOMES, INC. ('Brookfield')." Paragraph III.1., entitled "Release of Brookfield," includes the following release language which is the focus of the present dispute: "The Kellers, for themselves and their respective heirs, successors, affiliates, agents, insurers, attorneys and assignees hereby fully and forever release and discharge Brookfield, and its respective parent companies, subsidiaries, affiliated companies, predecessors, successors and assigns, and each of them (collectively the 'Brookfield Entities'), and all past, present and future shareholders, directors, officers, employees, agents, representatives, attorneys and insurers of the Brookfield Entities from any and all claims, actions, causes of action, demands, indemnity, contribution, suits, debts, sums, accounts, controversies, rights, awards, compensatory damages, punitive or exemplary damages, costs, attorney's fees, losses, expenses and liabilities whatsoever which the Kellers may now have, have had, or which may hereafter accrue, individually, collectively, or otherwise, arising out of or related to the Dispute, including but not limited to all claims arising out of or related to water damage to the Property, except those obligations otherwise set forth in this Agreement."

B. *Proceedings in the Trial Court*

At trial, the parties both contended the language of the release was clear and unambiguous, although they disagreed as to its meaning. At the Evidence Code section 402 hearing, the trial court explained that the next issue to be addressed was "the scope of the release previously given by [the Kellers]." The court stated that the release was an affirmative defense pleaded by ICDC. The court asked if counsel wanted to be

heard. Counsel for ICDC argued that the release covered ICDC as a "predecessor[]" to Brookfield in the chain of real estate title; counsel for McGrann did not wish to be heard before counsel for the Kellers argued.

The Kellers' counsel contended that "it's clear in the context of [the Agreement] the predecessors mean predecessor to the Brookfield Custom Homes, Inc., a predecessor entity, not the seller of the property." Counsel for ICDC responded by arguing the language of the Agreement did not say it was limited to a corporate predecessor and should be read to refer also to a predecessor owner of the real property.

The court asked whether Brookfield "would want to release their predecessor in title so that they are not brought right back into the dispute via a cross-complaint." The Kellers' counsel responded that this interpretation would not be "a fair reading" of the Agreement. ICDC's counsel replied that such a concern about a predecessor in title would have been "contemplated" by Brookfield.

The trial court then offered the parties the opportunity to present extrinsic evidence relating to the interpretation of the release. The only evidence offered was the testimony of Mr. Keller. Regarding the meaning of the term "predecessors" in the release, Mr. Keller testified as follows: "Adrian [Foley, Brookfield's president] had a multitude of different entities for which he was both working and operating under. [¶] We were actually even discussing an opportunity to purchase a home in Hawaii with him. And I had noted that many of his entities were either LLC's or other organizations and had asked him if he was responsible for each and all of those. And he had told me some yes and some no, and that that was the purpose behind the release of subsidiaries and predecessors, was basically to be all encompassing of any of the former Brookfield enterprises."

Mr. Keller further testified the term "predecessors" was not intended to include The Irvine Company or ICDC:

"Q. Did Mr. Foley ever tell you the predecessors meant to encompass any of The Irvine Company entities?

"A. No. And I had no knowledge of his ever purchasing this land from Irvine Company or if he had bought it from a third party. . . . [¶] . . . [¶]

"Q. Did Mr. Foley ever tell you the predecessors meant anyone who had been his predecessor in title on the property?

"A. No."

Counsel for ICDC contended that the court could "interpret this without the need for any parol evidence," and that there could be testimony from Mr. Foley to respond to Mr. Keller's testimony.

The trial court stated that Mr. Foley's testimony would not be necessary because the court did not "see an ambiguity in the agreement." The court noted that, even if Mr. Keller's testimony was accepted, "I don't see that it creates the kind of ambiguity . . . that requires the introduction of parol evidence."

C. *The Trial Court Determined ICDC Was Covered by the Release of Brookfield's "Predecessors"; This Determination Was Error.*

1. *The trial court's ruling and analysis*

The trial court concluded that the release, on its face, extended to ICDC:

"In looking at the settlement agreement, the settlement and agreement of release, paragraph Roman numeral II, subparagraph 1 describes the dispute. And dispute is a defined term and it is characterized as basically the plaintiffs' claim for, quote, 'all of the expenses that the Kellers claim to have suffered as a result of the water damage,' close quote.

"The only reasonable interpretation of that language is that they are asserting a claim for all of the expenses and they are compromising settling and releasing that claim.

"In paragraph 3, Roman numeral III, which is the release language itself on page 2 of the document, the plaintiffs release all of the claims, quote, 'arising out of or related to the dispute, including but not limited to all claims arising out of or related to water damage to the property,' end of quote. Again, that language seems to clearly indicate that the intent here is to release all of the claims.

"In looking at the language that we have been focusing on, which is the description of the category of entities that are releasees under the agreement, it includes Brookfield, quote, 'and its respective parent companies, subsidiaries, affiliated companies, predecessors, successors and assigns, and each of them.'

"One of the principles of contract interpretation that we rely on is that when possible, all of the words should be given a meaning and that words are not – we should avoid finding words to be surplusage.

"Plaintiffs' position is that predecessor – the word 'predecessor' simply means a corporate predecessor. Corporate predecessors could well be included within the term 'parent companies' and would certainly be included within the term 'affiliated companies.' So if predecessors simply meant corporate predecessors, I think it would be surplusage. It wouldn't add anything.

"I think the more logical interpretation here is that after the parties identified all of the corporate entities, meaning Brookfield, its parent companies, its subsidiaries, its affiliated companies, they then – the parties then included in the category of releasees the predecessors, as well as the successors and assigns of each of those.

"And I think that given the breadth of the release and the language in the paragraph Roman numeral II and paragraph Roman numeral III that make it very clear that the intent is to release all of the claims arising out of or related to water damage to

the property. The appropriate interpretation of the word 'predecessors' is that it includes Brookfield's predecessor in title to the property, which is Irvine Community Development, Inc. And a very practical reason for that interpretation is the one that we discussed and that plaintiff really didn't have a very effective answer for.

"Anyone in this situation, anyone in the circumstances here of Brookfield would understand that it would be necessary to make sure that this dispute is completely resolved. Otherwise, the plaintiffs would do precisely what they have done here, merely sue the predecessor in interest, Irvine Community Development, and then Brookfield would be very likely the subject of a cross-complaint by Irvine Community Development. And it would defeat Brookfield's goal here of buying its p[ea]ce by settling all of the plaintiffs' claims, quote 'arising out of or related to the water damage to the property,' end quote.

"And for those reasons, I conclude that these claims against ICDC, Irvine Community Development, Incorporated, have been released."

2. *Summary of the applicable law*

Whether a party is covered by the language of a release is governed by ordinary principles of contract interpretation. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 528; *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 439.)

"Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract. [Citations.] Thus, '[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the

language of the instrument is reasonably susceptible.' [Citation.] [¶] The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review. [Citations.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).)

3. *Analysis of the Agreement*

Having reviewed the release language de novo, we conclude the term "predecessors" means corporate predecessors, not predecessors in the chain of real estate title, and therefore the release of Brookfield's predecessors did not include ICDC. Paragraph III.1. of the Agreement describes the release as applying to "Brookfield, and its respective parent companies, subsidiaries, affiliated companies, predecessors, successors and assigns, and each of them (collectively the 'Brookfield Entities')." The terms "parent companies, subsidiaries, affiliated companies, predecessors, successors and assigns" all pertain to corporate structure, not to real estate title. Indeed, there is nothing in the release to suggest it relates to a chain of real estate title. The labeling of the released parties as the "'Brookfield Entities'" lends additional support to our interpretation. Accordingly, we conclude that the Agreement is not reasonably susceptible to a reading that the term "predecessors" refers to prior owners of title to the real property. Therefore, considering only the language of the Agreement itself, we hold ICDC was not covered by the release.

As noted, *ante*, the trial court concluded the term "predecessors" could not mean corporate predecessors, because corporate predecessors were already included within the terms "parent companies" and "affiliated companies." We disagree with this analysis because affiliated companies and parent or subsidiary companies are those currently in existence, while the term "predecessors" can include both existing and dissolved corporate entities. In addition, the trial court commented on Brookfield's

understanding of and goals in agreeing to the release language; but understandings and goals constitute, at best, Brookfield's subjective intent and are not reflected in the Agreement itself. The objective intent evidenced by the words of a contract, not the subjective intent of one of its parties, controls the interpretation of the contract. (*Founding Members, supra,* 109 Cal.App.4th at p. 956.)

4. *ICDC's cases are distinguishable*

The cases cited by ICDC are readily distinguishable. ICDC cites *General Motors Corp. v. Superior Court, supra,* 12 Cal.App.4th 435 for the proposition that a party need not be named in a release to receive its benefits. While that is a true statement of the law, the case is not applicable here. In *General Motors Corp. v. Superior Court, supra,* 12 Cal.App.4th at pages 437-438, the plaintiff's wife's car collided with a car driven by Charlotte Martinez; the plaintiff's wife died. The plaintiff settled with Martinez, and signed a settlement agreement which released Martinez and "'*any and all other persons, firms and corporations*, whether herein named or referred to or not, of and from any and all past, present and future actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, third party actions, suits at law or in equity, including claims or suits for contribution and/or indemnity, of whatever nature, and all consequential damage on account of, or in any way growing out of any and all known and unknown personal injuries, death and/or property damages resulting or to result from an accident that occurred on or about the 29th day of Sept. 1987, at or near San Bernardino, California.'" (*Id.* at p. 438, italics added.) The plaintiff later sued General Motors Corporation for wrongful death and products liability. (*Ibid.*) General Motors moved for summary judgment, arguing the terms of the settlement agreement released it. (*Ibid.*) The trial court denied the motion. (*Id.* at p. 439.)

The appellate court granted General Motors' petition for a writ of mandate. (*General Motors Corp. v. Superior Court, supra,* 12 Cal.App.4th at p. 437.) "[T]he plain

language of the release discharges General Motors as well as the rest of the world from liability arising from the specified automobile accident." (*Id.* at p. 441.) This is vastly more expansive release language than is present in the Agreement. (*Id.* at pp. 441-443.)[4]

In *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 554, the plaintiff sued the defendant for falsely representing certain limited partnership investments through its agent, Ronald Thon. At the same time, the plaintiff was a member of a class suing Thon and others (but not the defendant) in connection with the Hill Williams Income Fund II limited partnership. (*Id.* at p. 555.) The class action was settled, and the settlement agreement included a release of the named defendants *and their principals* for any claims relating to the Hill Williams entities. (*Ibid.*) Another panel of this court concluded the defendant was an intended third party beneficiary of the release in the class action settlement agreement. (*Id.* at pp. 559-560.) This appellate court also concluded the extrinsic evidence the plaintiff sought to offer—declarations regarding the plaintiff's undisclosed intent and belief that the class action settlement release would not cover the defendant in the separate action—was not admissible. (*Id.* at p. 560.) The exclusion of the extrinsic evidence in that case was consistent with the objective theory of contracts, under which the objective intent of the parties, as evidenced by the words of the contract, rather than the subjective intent of one of the parties,

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[4] *Lama v. Comcast Cablevision* (1993) 14 Cal.App.4th 59 is to the same effect as *General Motors Corp. v. Superior Court*. In that case, following an automobile accident, the plaintiff sued the driver of the other car, as well as the Doe defendant alleged to be the other driver's employer. (*Lama v. Comcast Cablevision, supra,* 14 Cal.App.4th at p. 61.) The plaintiff settled with the other driver, and signed a release which released the other driver "'and any other person, corporation, association or partnership charged with responsibility for injuries to the person and property of the Undersigned . . . as a result of an accident . . . which occurred on or about the 17th day of January 1989, at or near Highway 1, Lompoc, CA . . . .'" (*Ibid.*) The appellate court held the language of the release covered the other driver's employer (*id.* at p. 64), whom the plaintiff later sued under the theory that the other driver was acting in the course and scope of her employment when the accident occurred (*id.* at p. 62).

controls the contract's interpretation. (*Founding Members*, *supra*, 109 Cal.App.4th at p. 956.)

In *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 667, the appellate court concluded a release that covered the defendant subcontractor "'*and its insurers*'" made the insurer a third party beneficiary of the settlement agreement, giving it standing to sue for breach of the agreement.

5. *McGrann*

The trial court's conclusion that McGrann was covered by the release was due only to McGrann's status as an agent of ICDC. Our conclusion that ICDC was not covered by the release means that McGrann was not covered by the release, either.

6. *Other Defenses*

Both ICDC and McGrann alleged release as an affirmative defense to the Kellers' claims. Both also raised setoff, payment in full, and/or accord and satisfaction as affirmative defenses. Our holding herein does not consider the merit of any of those affirmative defenses. The argument by ICDC that payment to the Kellers by Brookfield was supposed to cover all damages caused by the flooding is directed at the applicability of these defenses, not at whether ICDC is covered by the release. The Kellers cannot enjoy double recovery for the same damages; no one has disputed or can dispute that conclusion.

II.

THE ATTORNEY FEES AWARD

The Kellers also appealed from the trial court's order awarding attorney fees to ICDC and McGrann. Because we reverse the judgment on which attorney fees were awarded, we also reverse the postjudgment order awarding attorney fees.

(*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1436.)

DISPOSITION

The judgment and the postjudgment order awarding attorney fees are reversed. The matter is remanded for trial. Appellants to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.